SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1942

No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,

Petitioner,

vs.

CITY OF MIAMI, FLORIDA.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT AND BRIEF SUPPORTING THE PETITION.

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No. 141

HIGHWAY CONSTRUCTION COMPANY OF OHIO, INC.,
Petitioner and Appellant Below,

vs.

CITY OF MIAMI, FLORIDA,
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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE FIFTH CIRCUIT.

To the Honorable Harlan Fiske Stone, Chief Justice of the United States, and the Associate Justices of the Supreme Court of the United States:

Your Petitioner, Highway Construction Company of Ohio, Inc., a corporation organized and existing under the laws of the State of Ohio, respectfully shows:

I.

Summary Statement of Matter Involved.

This is an action at law, brought in the United States District Court, Southern District of Florida, by Highway

Construction Company of Ohio, Inc., a corporation organized and existing under the laws of the State of Ohio, petitioner herein, against the City of Miami, Florida, respondent herein, on seven paving contracts, designated respectively PV 69 to PV 75, inclusive. These contracts, including the plans and specifications, are identical in every respect, except the description of the streets to be paved, the quantity of work to be performed, and the amount of bond to be given by the petitioner as a guarantee for performance. The petitioner commenced the work simultaneously under each contract in the early part of 1926, and fully completed the work, under the direction of the City Engineer, in the latter part of December, 1926. From time to time, as the work progressed, payments were made by the respondent to the petitioner.

The respondent, on completion of the contracts, accepted the work as satisfactorily executed according to the plans and specifications (R. 4350, R. 4352), and the City Engineer prepared final estimates which show an aggregate balance due the petitioner from the respondent of $23,263.15 (R. 4214, R. 4290).

The petitioner refused to accept the amount so found to be due by the City Engineer, for the reason that said estimates did not include any compensation for work performed and materials furnished on the order of the City Engineer in excess of the amounts and of the same kind as named in the Instructions to Bidders, and changes in the quantity or cost of work and material, consisting of claims for:

Additional depth of laying rock foundation (R. 644), additional depth of inlets (R. 524), additional depth of catch basins (R. 554), reconstruction of old manholes (R. 1073), additional depth of laying sewer pipe (R. 615), additional depth of grading (R. 911), grading the area occupied by the curb and gutter (R. 938), increased cost of coarse aggregate (R. 1311), increased cost of finishing sub-

grade (R. 747), increased cost of rock used in the foundation (R. 1173), and increased cost of work in patching curb and gutter (R. 1233). These claims, aggregating more than $480,000, computed at the unit price specified in the contract, together with a small claim for extra work and material in the sum of $2,204.62 (R. 4301), were completely ignored by the Engineer in his report and final estimate to the Commission of the City of Miami (R. 4214, 4287, 4356 to 4364).

This suit is to recover compensation for such excess or additional work and material, and for such increased cost of work and material, performed and supplied under the express provisions of paragraphs 7 and 9 of the contracts (R. 4134-4).

The amended declaration, on which the case was tried, contains 71 counts, and any synopsis of it is too long to be included in this petition. It may be found on pages 13 to 187 of the record. Certain counts of said amended declaration were amended, and these amendments may be found on pages 290 to 353 of the record. The pleas and defenses are many and long, too long to include a synopsis thereof in this petition. They may be found on pages 202 to 207, 221 to 239, 253 to 266, 334 and 3913 of the printed record. The petitioner made an effort to have the pleadings settled before the trial, and assigned for hearing its motion to strike certain matters from the petitioner's reply to the respondent's counterclaim, but the trial court decided that it would defer rulings until the trial of the cause (R. 256), and thereafter neither the petitioner nor the respondent made any further effort to have the pleadings settled or issues made up prior to the trial, and the parties went to trial without the pleadings having been settled; and all the evidence was introduced, requested charges presented, and argument on both sides completed without the pleadings having been settled. It was not until the trial court came to deliver its final charge to the Jury that any rulings were

made (R. 3907-3921), and the rulings then made, after the evidence was all in and after the case had been argued before the Jury, were futile acts.

The trial was by Jury. There is very little dispute as to matters of fact. The record will disclose that at least 90% of the testimony is nothing more than the opinions of witnesses as to how they think the contracts sued on should be interpreted, and argument between counsel and witnesses concerning such interpretation. The case, in the main, before the Jury was a dispute, not of fact but of interpretation, of the contracts and plans and specifications made a part thereof, which the trial court refused to construe and left the Jury free to put its own interpretation thereon.

Special verdicts were rendered in favor of the respondent on the claims of the petitioner for said additional work, and a special verdict was rendered in favor of the petitioner for the amount shown as owing to the petitioner on the final estimates of the City Engineer (R. 4517), and judgment was entered accordingly (R. 4629). The petitioner's motion to set aside the special verdicts in favor of the respondent and to grant it a new trial (R. 4524) was denied by the trial court (R. 4628).

An appeal from said judgment was taken by the petitioner to the Circuit Court of Appeals (R. 4639), and said appellate court entered, on February 25, 1942, its judgment modifying the judgment of the District Court to the extent of allowing interest on the $23,263.15 special verdict in favor of the petitioner, and, as so modified, affirmed the judgment in all other respects (R. 4746).

II.

Jurisdictional Statement.

(1) The statutory provision which is believed to sustain the jurisdiction of this Court is Section 240 of the Judicial Code, as amended, Sec. 347, Title 28, Ch. 9, U. S. C. A., 1940 Ed., page 2533.

(2) The date of the judgment of the Circuit Court of Appeals sought to be reviewed is February 25, 1942 (R. 4746).

(3) The time for filing a petition for rehearing in the Circuit Court of Appeals was enlarged on March 6, 1942, to March 30, 1942 (R. 4747).

(4) The petition for rehearing was presented on March 26, 1942 (R. 4753) and denied on April 6, 1942 (R. 4778).

(5) The mandate of the Circuit Court of Appeals was stayed, on April 13, 1942, for a period of three months from April 6, 1942, to enable the petitioner to apply for a writ of certiorari from the Supreme Court (R. 4782).

(6) Federal jurisdiction in the District Court was invoked on the ground of diversity of citizenship. The amount in controversy is alleged and conceded to exceed $3,000, exclusive of interest and cost.

(7) The opinion of the Circuit Court of Appeals will be found on pages 4737-4745 of the certified copy of the record of said Circuit Court of Appeals, and is reported in 126 Federal Reporter, 2d Series, 777.

(8) The date on which this petition for writ of certiorari and supporting brief, and the record, were filed with the Clerk of the Supreme Court is June 11, 1942.

III.

The Questions Presented to the Circuit Court of Appeals for Decision.

The principal questions presented on said appeal were:

(1) Were the special verdicts in favor of the respondent on the petitioner's claims for additional and extra work and materials supported by the evidence and the law?

This question arose by the trial court's refusal to set aside said verdicts, on motion of the petitioner, and to grant the petitioner a new trial (R. 4524-4566, 4591, 4596, 4598).

(2) Was the trial court justified in leaving to the Jury the question of law of what was additional work and what was extra work under the contracts sued on (R. 3995-4003), the contracts having clearly defined what was additional work and what was extra work, and the petitioner having requested the Court to instruct the Jury that the petitioner's claims for additional depth of inlets, additional depth of catch basins, additional depth of rock foundation, additional depth of excavation, and for laying sewer pipe to an additional depth, were not claims, within the purview of the contracts, for extra work performed (R. 4497), which the Court refused (R. 4083)?

(3) Was the trial court justified in leaving to the Jury the question of whether or not, under the contracts sued on, the provisions in the contracts relating to extra work to the effect that "no claim whatever for extra work will be considered or paid except only when ordered in writing by the Engineer" etc., applied to the performance of additional work and material (R. 3996); the contracts having definitely confined the application of such provision to extra work, and the petitioner having requested the Court to charge the Jury that quantities of work and material in excess of those named in the Instructions to Bidders, and of the same kind, were not to be considered as extra work (R. 4497), which the Court refused (R. 4083)?

This question arose in connection with the petitioner's claims for additional depth of inlets and catch basins, additional depth of rock foundation, and for laying sewer pipe to an additional depth.

(4) Was the trial court justified in leaving the Jury to decide whether or not a predicate had been properly laid by the petitioner, under the "doubt and obscurity" provision contained in the contracts sued upon, for the admission of parol evidence that the City Engineer had explained to the petitioner the meaning of certain plans and specifications which were made a part of said contracts (R. 3985, 4033)?

This question arose in connection with the petitioner's claims for increased cost of coarse aggregate used in the binder course and increased cost of rock used in the foundation.

(5) Was the trial court justified in leaving the Jury to decide whether the said contracts sued on required orders for additional or increased quantities of work or material to be placed in writing by the City Engineer (R. 3996); the said contracts having definitely provided, in this respect, that the right was expressly reserved for the City Engineer to increase quantities, of the same kind as mentioned in the Instructions to Bidders, to such extent as he might find necessary for the proper completion of the work (Par. 7, page 4132)?

This question arose in connection with the petitioner's claims for additional depth of foundation, additional depth of inlets and catch basins, and laying sewer pipe to an additional depth.

(6) Was the trial court justified in leaving the jury to decide whether the provisions of the specifications, relating to finishing the surface of the subgrade for the pavement, providing as follows:

> "When the rolling is completed the surface must be nowhere more than one inch above the true subgrade,"

applied to the whole area to be occupied by the pavement and its foundation (R. 4025), the specifications (R. 4146) having clearly so provided?

(7) Were the following charges of the trial court, given on its own initiative to the jury, relating to the petitioner's claims for increased cost of rock used in the foundation, in view of certain provisions contained in the contracts sued on, proper charges or improper and prejudicial to the petitioner?

> "In the first place, you are the judges as to whether there was doubt or obscurity as to this requirement that the rock was to have a cementing value of not less than 45, according to the standards of the Bureau of Public Roads. It is not a question of whether the representatives of the Highway Construction Company thought that there was obscurity as to this requirement. The question for you to determine first is whether as a matter of fact such specifications under the evidence that you have heard in the case did furnish a doubt or obscurity as to the specifications. If there was no doubt or obscurity, you go no further insofar as considering any oral explanation before the letting as constituting a part of the contract * * *" (R. 4033).
>
> "* * * The plaintiff had a right to ask an explanation of the meaning of the words (having a cementing value of not less than 45,) but if any explanation was given or said meaning was inconsistent with the other terms and conditions of the written contract, such explanation should have been reduced to writing and made a part of the contract" (R. 4035).
>
> "You also have for your consideration, question as to whether the claim is for extra work or for additional work * * *" (R. 4036).

The petitioner expressly objected to the charge given to the jury by the court in respect to the petitioner's claims for increased cost of rock used in the foundation (R. 4053-4) which was overruled by the court (R. 4058).

(8) Were the following charges of the trial court, given on its own initiative to the jury, relating to the petition-

er's claims for additional cost of "coarse aggregate" used in the asphalt binder course, in view of certain provisions contained in the contracts sued on, proper charges or improper and prejudicial to the petitioner?

"By this amendment the plaintiff invokes that provision of the instructions to bidders and brings into the case the principle of adding to the provisions of the contract the oral interpretation of the Engineer, made before the letting of the contracts. First you are to consider the fact that such oral conversations before the letting of the contracts can only become a part of the contract under the provision that the proposal itself makes a provision for an inquiry being made of the Engineer, prior to the submission of bids, and that that oral conversation resulting to an interpretation by the Engineer can only arise if there exists some obscurity or doubt with reference to the specifications, or some errors or omissions in regard to the plans (R. 4019-4020).

"* * * You are the judges as to whether there was a doubt or obscurity. If you decide that there was no doubt or obscurity, then the oral interpretation cannot be made a part of the contract. * * * I call your attention to the fact that there were other specifications with regard to the coarse aggregate in this three inch asphalt binder, and that the part of the plaintiff's claim set forth in its amended declaration, that local rock—meaning rock obtained from quarries in the Miami area—could and should be used as coarse aggregate in said asphalt binder course, and which then and there became and was the coarse aggregate specified to be furnished in said binder course, could not alter or make inapplicable the other provisions of the specifications in regard to the coarse aggregate. Hence it is, even though you may find for the plaintiff on the allegations with reference to this particular provision of the specifications, I charge you that other expressed and clear requirements of the specifications, if any, as

to the coarse aggregate in the three inch asphalt binder course, continued to be a part of the contract * * *" (R. 4020-21).

"* * * The City Engineer was under an obligation as well as within his right, in requiring that the rock in this three inch asphalt binder course should comply with the non-doubtful and non-obscure requirements, and the plaintiff was not entitled to rely upon an alleged oral agreement that local rock from some local quarry would satisfy the contract requirements, if thereby the non-doubtful or non-obscure provisions were ignored * * *" (R. 4021-2).

"* * * Of course, in addition to what I have stated in connection with this claim, you are to consider that charge I have given you in regard to the distinction between extra and additional work, with the charge as to waiver by estoppel, as to which I have fully charged you * * *" (R. 4022).

The petitioner expressly objected to the charge given to the Jury by the Court in respect to the petitioner's claims for increased cost of "coarse aggregate" for the binder course (R. 4053-4-5), which was overruled by the Court (R. 4058).

(9) Was the trial court justified in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely a question of law?

This question arose by action of the trial court in withdrawing from the consideration of the Jury the petitioner's said claim for additional grading or excavation (R. 3988), over its objection (R. 4051).

(10) Was the trial court justified in withdrawing from the consideration of the Jury the claims of the petitioner

for grading the area of the pavement occupied by the curb and gutter, regardless of the evidence, as being purely a question of law?

This question arose by the action of the trial court in withdrawing from the Jury the petitioner's claims for grading or excavating the curb and gutter area (R. 3988-9) over its objection (R. 4052).

(11) Was it prejudicial error for the trial court, when the Jury, after deliberating of their verdict, reported that they were "hopelessly tied up where they could reach no decision," to ask the Jury how they were numerically divided (R. 4092 to 4118)?

(12) Were the final estimates, showing the amount of the work performed and materials furnished by the petitioner, final and conclusive between the petitioner and respondent, under paragraph 6 of the contracts sued on, there being evidence to the effect that large quantities of additional and extra work and materials were performed and furnished by the petitioner to the respondent under said contracts and not included in said final estimates by the City Engineer?

All of said questions were duly raised and argued by the petitioner in said District Court and in said Circuit Court of Appeals.

IV.

Reasons Relied On for Allowance of Writ.

A.

The decision of said Circuit Court of Appeals, as to the alleged error of the trial court in refusing to interpret to the Jury the unambiguous provisions of the contracts sued

on by the petitioner, by holding that such error was in favor of the petitioner and that the petitioner may not be heard to complain (R. 4742), the said Circuit Court of Appeals, having found that the trial court declined to construe and pass upon the different sections of the contracts sued on, except in one or two instances (R. 4742), so far departs from the accepted and usual course of judicial proceedings, or so far sanctions such a departure by the lower court, as to call for an exercise of the power of supervision of the Supreme Court of the United States.

B.

The decision of said Circuit Court of Appeals, by holding that the final estimates of the respondent's engineer of the amount of work performed and materials furnished by the petitioner were final and conclusive between the respondent and petitioner, in the absence of bad faith, fraud or deceit of the engineer (R. 4744), is a decision of an important question of local law in a way probably in conflict with applicable local decisions, and is a decision in conflict with the decision of the Circuit Court of Appeals for the First Circuit in the case of *Gammino* v. *Inhabitants of Town of Dedham,* 164 F. 593, on substantially the same matter.

C.

The decision of said Circuit Court of Appeals, on the alleged error of the trial court in asking the Jury how they were numerically divided after they had deliberated of their verdict and reported that they were "hopelessly tied up where they could reach no decision" (R. 4092 to 4118), by holding that the alleged error was lost to the petitioner because of its failure to object or except to such action of the trial court (R. 4744), is a decision of an important federal

question in a way probably in conflict with applicable decisions of the Supreme Court of the United States.

D.

The decision of said Circuit Court of Appeals, by holding that the respondent was entitled to judgment as a matter of law on the petitioner's disputed claims for excess or additional work and material under the unambiguous terms of the contracts (R. 4744), so far departs from the accepted and usual course of judicial proceedings as to call for an exercise of the power of supervision of the Supreme Court of the United States.

E.

The decision of said Circuit Court of Appeals, by affirming the action of the trial court in withdrawing from the consideration of the Jury the claims of the petitioner for additional grading, regardless of the evidence, as being purely questions of law, so far departs from the accepted and usual course of judicial proceeding as to call for an exercise of the power of supervision of the Supreme Court of the United States.

Prayer.

WHEREFORE, your petitioner prays that a writ of certiorari issue under the seal of this Court, directed to the Circuit Court of Appeals for the Fifth Circuit, commanding said Court to certify and send to this Court a full and complete transcript of the record and of the proceedings of said Circuit Court of Appeals had in the case numbered and entitled on its docket No. 9938, *Highway Construction Company of Ohio, Inc., Appellant, versus City of Miami, Florida, Appellee,* to the end that this cause may be reviewed and

determined by this Court, as provided for by the Statutes of the United States; and that the judgment herein be reversed by the Court, and for such further relief as to this Court may seem proper.

Dated this 4th day of June, 1942.

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